

1997

State of Utah, Plaintiff/Appellee v. Boyd Lee Preece, Defendant/Appellant : Reply Brief

Utah Court of Appeals

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Tony C. Baird; Attorney for Appellee.

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

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| Plaintiff/Appellee, |) | |
| |) | |
| v. |) | Case No. 970576-CA |
| |) | |
| BOYD LEE PREECE, |) | |
| |) | |
| Defendant/Appellant. |) | Priority No. 15 |
| |) | |

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REPLY BRIEF OF APPELLANT

THIS IS AN APPEAL OF A JUDGMENT AND SENTENCE
OF THE FIRST JUDICIAL DISTRICT COURT
FOR CACHE COUNTY, UTAH
THE HONORABLE BURTON H. HARRIS

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

THE ERROR COMMITTED BY THE TRIAL JUDGE WAS SUFFICIENTLY CONSEQUENTIAL THAT THERE WAS A REASONABLE LIKELIHOOD THAT IT WOULD EFFECT THE OUTCOME OF THE PROCEEDINGS.

Errors that result in reversal fall into two (2) categories. The first consists of errors which were properly preserved below and presented on appeal in which, when considered in context, are deemed harmful, i.e., there is a reasonable likelihood the error effected the outcome in the trial court. See Utah R. Crim. P. 19(c), 30(a); Utah R. Evid. 103(a); State v. Verdi, 770 P.2d 116 (Utah 1989). The secondary category of errors that results in reversal consists of those that we label "plain error." State v. Eldredge, 773 P.2d 29 (Utah 1989). These are errors that we deem harmful, and though they are not properly preserved, are raised on appeal, and we conclude that

their erroneous character should be deemed obvious. See Utah R. Evid. 103(d); Utah R. Crim. P. 19(c); Utah R. Civ. P. 51.

The State concedes that the trial court committed error in sustaining the State's objection in concluding that §41-6-44(2)(i) Utah Code Annotated describes the conditions in said section as a conclusive presumption rather than presumptive. Plaintiff asserts that Defendant failed to preserve the issue for appeal claiming that when the State made the objection, the court upheld the objection and the Defendant's attorney agreed with the decision stating, "That's right." (T at 78). Defendant disputed that he was not agreeing with the court's decisions but rather questioning the court's decision when it asked, "That's right?" .

Since the issue was properly preserved, the next issue is whether the error committed was sufficiently consequential that there is a reasonable likelihood that it would effect the outcome of the trial court. Here, Officer Denney testified that he acknowledge that the metabolic rate is .15 per hour times one and one-half, which is approximately two and one-half, which rebutted the presumption in placing Defendant/Appellant under the .08 breath alcohol. Thereby assuming that the trial court would have allowed Officer Denney's testimony regarding the metabolic rate, the testimony of the officer would/could have established the trial court's decision that the Defendant was under the legal limit of .08.

The second category of errors are those errors that are labeled "plain error." These are errors that are deemed harmful, and although they are not properly preserved below, they are raised on appeal and we conclude that their erroneous character be deemed obvious.

It is undisputed that the trial court committed error in sustaining the objection in concluding that §41-6-44(2)(i) Utah Code Annotated describes the condition in said statute as conclusive presumption rather than presumptive. The court's statutory interpretation was incorrect. Manifest injustice would result if Defendant is unable to cross-examine Officer Denney to determine whether the State met the presumption that Defendant was driving with a .08 blood alcohol as required by §41-6-44(2)(i).

CONCLUSION

For the reasons set forth of the foregoing and the Brief of the Appellant and the Reply Brief of the Appellant, Defendant/Appellant request the court to reverse the judgment and sentence of the trial court and remand the case to the District Court allowing Defendant/Appellant to put on the requisite evidence to establish whether the Defendant/Appellant's breath alcohol was under .08 at the time of the arrest.

DATED this 13 day of August, 1998

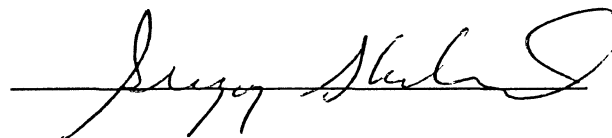

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing
REPLY BRIEF OF APPELLANT in the United States mail, postage prepaid, to the
following:

Tony Baird
Deputy Cache County Attorney
11 West 100 North
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Logan, UT 84321

DATED this 12 day of August, 1998.

A handwritten signature in black ink, appearing to read "Gregg Shuler", written over a horizontal line.